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## LIM CHUN JIE v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
GUNALAN MUNIANDY JCA
HASHIM HAMZAH JCA
B [CRIMINAL APPEAL NOS: B-06A(M)-22-09-2018, B-06A(M)-23-09-2018 & B-06A(M)-24-09-2018]
8 FEBRUARY 2022

C **Abstract** – *The trial judge, in convicting the accused persons as per the charges under ss. 109 and 302 of the Penal Code, based on the circumstantial evidence, did not err in doing so. The circumstantial evidence presented by the prosecution led to strong inferences that the accused persons were guilty of the murder of the deceased and corresponded with the nature of death of the deceased.*

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***CRIMINAL LAW:*** *Murder – Circumstantial evidence – Whether trial judge conducted maximum evaluation of evidence produced by prosecution – Whether bodily injury suffered by deceased sufficient in ordinary course of nature to cause death – Whether evidence pointed to accused persons as having inflicted bodily injuries to deceased – Whether conduct of accused persons showed attempts to hide crime committed – Whether conducts negated defence raised – Whether absence of motive exculpated accused persons – Whether defence bare denial – Whether overall circumstances supported conviction – Penal Code, ss. 109 & 302*

E

***EVIDENCE:*** *Circumstantial evidence – Murder – Whether trial judge conducted maximum evaluation of evidence produced by prosecution – Whether bodily injury suffered by deceased sufficient in ordinary course of nature to cause death – Whether evidence pointed to accused persons as having inflicted bodily injuries to deceased – Whether conduct of accused persons showed attempts to hide crime committed – Whether conducts negated defence raised – Whether absence of motive exculpated accused persons – Whether defence bare denial – Whether overall circumstances supported conviction – Penal Code, ss. 109 & 302*

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***EVIDENCE:*** *Identification evidence – Witness identification of accused – 'Last seen together' theory – Admission by accused persons to have been with deceased prior to death – Whether witness positively identified accused person in identification parade – Whether identification parade tainted – Whether vitiated identification parade – Whether identification in court substantive evidence – Whether dock identification satisfactory*

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***EVIDENCE:*** *Information leading to facts discovered – Information given by accused – Discovery of personal items of deceased – Whether police had prior knowledge of whereabouts of things – Whether things would not have been*

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*discovered if not for information given by accused person – Whether showed knowledge of locations where items disposed of – Whether raised strong presumption of accused persons' involvement in murder – Evidence Act 1950, s. 27*

The police retrieved a body floating in the flood retention pond besides the Putrajaya-Cyberjaya highway and initiated an investigation. The body was later identified by SP9 and his sister ('SP28') as their father ('deceased'). Subsequently, the police arrested the second and third appellants, the officers of the Special Malaysia Disaster Assistance and Rescue Team ('SMART'), and they were jointly charged under s. 302 of the Penal Code ('PC') read together with s. 34 of the PC. The first appellant was charged under s. 109, read together with s. 302, of the PC for abetting the second and third appellants to commit the offence. The prosecution's case against the second and third appellants was purely based on the following circumstantial evidence, *inter alia*, that: (i) the second appellant, being the owner of phone number 014-5017232, was the one who called the deceased that night in question and insisted to go to the deceased's durian orchard; (ii) the second and third appellants were the last people to be seen with the deceased before he went missing and was later found dead ('last seen together' theory); (iii) the conduct of the second appellant who tried to escape and had resisted arrest when the police went to his house to arrest him; (iv) the discovery of some personal items belonging to the deceased based on the information given by the second appellant while he was in police custody; (v) the discovery of the black nylon ropes based on the information given by the second appellant while he was in police custody which, according to the Government Science Officer, were similar in terms of colour, size and composition and probably originated from the same source with the ropes found tied on the body of the deceased; and (vi) the conduct of the third appellant in sending his red Pajero to be repainted and to replace the whole carpet after the deceased's body was found. All these pieces of circumstantial evidence, when taken cumulatively, pointed irresistibly to the second and third appellants' guilt. The trial judge, having found that the appellants' defence was a bare denial and did not cast any reasonable doubt on the prosecution's case, held that the prosecution had proven the charges against the appellants beyond reasonable doubt and convicted the appellants accordingly. The appellants were sentenced to death. Dissatisfied, the appellants filed their respective appeals against their conviction and sentence. The grounds of appeal submitted by the second appellant were that the trial judge erred (i) in his finding that SP14, the deceased's brother who was also a worker in the deceased's orchard, had positively identified the second appellant at the identification parade even though the identification parade was tainted; (ii) in his finding that the discovery of certain items belonging to the deceased was a discovery under s. 27 of the Evidence Act 1950 as against the second appellant; (iii) in his finding that the second appellant made ten phone calls to the deceased on the night in question when there was

A no proof that phone number 014-5017232 belonged to the second appellant; and (iv) in concluding that the second appellant's defence was a bare denial. On the other hand, the third appellant submitted the trial judge erred (i) in his finding that the third appellant had taken his red Pajero to be repainted to hide his crimes; (ii) by not considering the doubt in the deceased's time
B of death; (iii) by not considering the absence of motive on the part of the third appellant; (iv) by not considering that there was no pre-arranged meeting of the mind and therefore there was no common intention; and (v) by failing to invoke adverse inference against the prosecution for their failure to call the security guard at the deceased's house to give evidence as witness.

C **Held (dismissing appeals)**
**Per Hashim Hamzah JCA delivering the judgment of the court:**

**(1)** The appellant submitted that the trial judge erred in finding the second appellant had made ten calls to the deceased on the night in question without any evidence to prove the phone number belonged to the second
D appellant. There was no merit in the submission. The evidence by the prosecution witnesses showed that there were incoming calls to the numbers registered under the deceased's name from the number registered in the name of the second appellant. The most crucial evidence was the second appellant admitting to have called the deceased
E on that night on the instruction of the third appellant and also admitting to have stored the deceased's phone number in his handphone. (paras 61-66)

**(2)** The 'last seen together' theory, *ie*, the fact the accused and the deceased were last seen together is an incriminating fact against the accused.
F However, the mere fact that the accused was last seen together with the deceased does not necessarily lead to the irresistible conclusion the accused had committed the crime. In order to successfully attract the application of 'last seen together' theory, the prosecution must be able to lead evidence to show that, shortly before the commission of crime,
G the accused and the deceased were seen together. The time gap must be very small that there may not be any possibility that any person other than the accused could have committed the crime. In this case, the second and third appellants themselves, in their defence, confirmed that they did go with the deceased to the orchard on the night in question.
H They also confirmed the position that they were inside the third appellant's car, as per the prosecution's version. Taking into account all the evidence adduced, the non-compliance by the trial judge to exercise caution as outlined in the *Turnbull* guideline was not fatal. (paras 67, 68, 81, 82 & 84)

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**(3)** In circumstances when the witness has the opportunity to see the accused before the identification parade was conducted, the evidence of subsequent identification at the parade by him was supposed to be vitiated. However, in this case, SP14 was able to identify the second appellant from the dock. The substantive evidence of identification is the evidence of identification in court. It is not in all cases that the defects relating to the identification parade justify the rejection of the identification evidence given by witnesses in court. The court was satisfied that SP14's dock identification was satisfactory. (paras 73, 74, 76 & 80)

**(4)** There was no merit in the issue that the deceased could have died on any day, from 5 July 2015 to 10 July 2015 since the forensic pathologist expert estimated the time of death was five days or less prior to the discovery of the body. The prosecution witnesses had testified that they saw the deceased well and alive up until 11 to 11.45pm on 7 July 2015 when the deceased was last seen leaving the durian orchard with the second and third appellants in the red Pajero. The second wife of the deceased ('SP10') gave evidence that the deceased left her house at about 10pm and never came back. There was no response when she tried calling and texting the deceased after she woke up at 2.30am the next day. These facts were never challenged by the appellants since SP10 was never cross-examined. (paras 87-90)

**(5)** There was no merit in the second appellant's submission that the trial judge erred in finding the personal items belonging to the deceased were discovered pursuant to an information given by the second appellant under s. 27 of the Evidence Act 1950. SP20, to whom the second appellant was alleged to have given the information leading to the discovery of the deceased's personal belongings, testified that the police had no prior knowledge regarding the whereabouts of things seized and confirmed that had it not been for the information supplied by the second appellant, the items would not have been discovered. Further, the discrepancy in the evidence of SP9 was minor, insignificant and did not affect the totality of the evidence adduced by the prosecution. The discovery of the deceased's personal items based on the information supplied by the second appellant showed that he knew of the various locations where the items had been disposed of, and this would raise a strong presumption in support of the prosecution's case that he was involved in the murder of the deceased. (paras 91, 94, 100, 101, 103)

**(6)** The trial judge found that the conduct of the third appellant in sending the red Pajero to be repainted raised the presumption that he was trying to hide the crime of murdering the deceased. Further, the evidence the third appellant wanted the job to be completed as quickly as possible but did not inform the reason for it, negated the appellant's defence that he

A sent the car to be repainted for the purpose of celebrating Eid. The overall circumstances of the case supported the findings and there was no reason to disturb the same. The second appellant tried to escape and resisted arrest when SP20 and his team went to his house but denied the same during the defence stage and claimed to have been assaulted by the
B police. As the second appellant had failed to discharge the onus of explaining his conduct, an inference against the claim of innocence of the second appellant may be safely presumed. (paras 106, 108, 111-113 & 115)

**(7)** The absence of motive, even when the prosecution's case relied solely
C on circumstantial evidence, does not in itself exculpate the accused or render the conviction to be unsafe. Therefore, even though the prosecution fell short of proving motive to murder the deceased on the part of the second and third appellants, there was other circumstantial evidence which supported the conviction against them based on the
D overall circumstances of the case. The prosecution also had successfully proven the element of common intention. The trial judge, having analysed the appellant's defence thoroughly, came to the conclusion that the defence was merely a bare denial. The trial judge had not imposed a higher burden than what was legally required against the appellants.
E In the circumstances, there was no misdirection by the trial judge and, accordingly, the conviction against the second and third appellant was safe. (paras 122, 125, 128, 133, 135 & 137)

**Case(s) referred to:**

*Abdul Samid Edward v. PP [2015] 4 CLJ 149 CA* ***(refd)***
F *Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC* ***(refd)***
*Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC* ***(refd)***
*Aung Thun & Anor v. PP [2013] 1 LNS 985 CA* ***(refd)***
*Chang Kim Siong v. PP [1967] 1 LNS 18 FC* ***(refd)***
*Chean Siong Guat v. PP [1969] 1 LNS 23 HC* ***(refd)***
*Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC* ***(refd)***
G *Dorai Pandian Munian & Anor v. PP [2012] 10 CLJ 22 CA* ***(foll)***
*Farose Tamure Mohamad Khan v. PP & Other Appeals [2016] 9 CLJ 769 FC* ***(foll)***
*Goh Ah Yew v. PP [1948] 1 LNS 13 HC* ***(refd)***
*Ho Sek Kong v. PP [2011] 6 CLJ 522 CA* ***(refd)***
*Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC* ***(refd)***
*Lim San Muk v. PP [2019] 1 LNS 1762 CA* ***(refd)***
H *Losali v. PP [2012] 2 CLJ 178 CA* ***(refd)***
*Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC* ***(refd)***
*Mahavir Singh v. State Of Haryana [2015] 3 CLJ 1009* ***(refd)***
*Md Desa Hashim v. PP [1995] 4 CLJ 677 FC* ***(refd)***
*Mohamad Deraman v. PP [2011] 3 CLJ 601 CA* ***(refd)***
*Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA* ***(refd)***
I *Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA* ***(refd)***
*Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC* ***(foll)***
*PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC* ***(refd)***

*PP v. Hashim Hanafi [2003] 8 CLJ 555 HC* ***(refd)***
*PP v. Liew Sam Seong [1981] 1 LNS 159* ***(refd)***
*PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
*PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC* ***(refd)***
*Rajamorgan Marimuthu v. PP [2014] 6 CLJ 850 CA* ***(refd)***
*Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain [2017] 1 LNS 502 CA* ***(refd)***
*Rasoul Bagherbejandi Ahmad v. PP & Another Case [2015] 1 LNS 772 CA* ***(refd)***
*Soha Beta v. PP [2020] 1 LNS 62 CA* ***(foll)***
*Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC* ***(refd)***
*That Wei v. PP [2021] 1 LNS 1358 CA* ***(refd)***
*Wong Chooi v. PP [1967] 1 LNS 207 HC* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, s. 27

*For the 1st appellant - Gobind Singh Deo & Loh Suk Hwa; M/s Gobind Singh Deo & Co*
*For the 2nd appellant - Mohd Haijan Omar; M/s Haijan Omar & Co*
*For the 3rd appellant - Andrew Lourdusamy & Chua Yong Yi; M/s Andrew & Assocs*
*For the respondent - Abdul Ghafar Ab Latif & Aida Khairuleen Azli; DPPs*

*[Editor's note: Appeal from High Court, Shah Alam; Criminal Suit No: 46B-1-05-2016 (affirmed).]*

*Reported by S Barathi*

## JUDGMENT

### Hashim Hamzah JCA:

### Introduction

**[1]** There are three appeals before this court. The first appeal (B-06A(M)-22-09-2018) is filed by Lim Chun Jie ("the first appellant"). The second appeal (B-06A(M)-23-09-2018) is filed by Syazwan bin Saad ("the second appellant"). The third appeal (B-06A(M)-24-09-2018) is filed by Iskandar Zulkarnain bin Abdul Manaf ("the third appellant"). The Public Prosecutor is the respondent in all the three appeals.

**[2]** The second and third appellants were jointly charged before the High Court of Malaya in Shah Alam, Selangor. The charge preferred against them reads:

> Bahawa kamu bersama-sama di antara 7 Julai 2015 jam lebih kurang 11.00 malam hingga 10 Julai 2015 jam lebih kurang 6.00 petang, di Lombong Tembatan Banjir, Lingkaran Putrajaya, Cyberjaya, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian terhadap ALIAS BIN MAT NOOR (631107-10-6683), dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama s. 34 Kanun yang sama.

**[3]** The first appellant was charged with abetting the second and third appellants to commit the offence above. The charge against the first appellant reads:

> Bahawa kamu di antara 7 Julai 2015 jam iebih kurang 11.00 malam hingga 10 Julai 2015 jam lebih kurang 6.00 petang, di Lombong Tembatan Banjir, Lingkaran Putrajaya, Cyberjaya, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah bersubahat bersama Syazwan bin Saad (No. KP: 860930-02-5483) dan Iskandar Zulkarnain bin Abdul Manaf (No. KP: 870327-30-5033) untuk melakukan pembunuhan dengan menyebabkan kematian terhadap ALIAS BIN MAT NOOR (631107-10-6683), di mana kesalahan tersebut telah dilakukan akibat persubahatan kamu dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan dan dibaca bersama seksyen 302 Kanun yang sama.

**[4]** The prosecution's application for joint trial was allowed by the learned trial judge. At the close of prosecution's case, the learned trial judge called the appellants to enter defence on their respective charges. All the appellants testified under oath. They did not call any other witnesses to give evidence.

**[5]** At the conclusion of the trial, the learned trial judge found that the prosecution had proven the charges against the appellants beyond reasonable doubt and convicted the appellants accordingly. The appellants were sentenced to death. Dissatisfied, the appellants filed their respective appeals against their conviction and sentence to the Court of Appeal.

**[6]** The three appeals came up for hearing before us. We have allowed the first appellant's appeal and set aside his conviction. The Public Prosecutor did not appeal against the said decision.

**[7]** With regard to the second and third appellants, we have dismissed their appeals and affirmed their conviction and death sentence. The second and third appellants filed their respective appeals against our decision to the Federal Court. These are our reasons for dismissing the second and third appellants' appeals.

## Brief Facts

**[8]** The salient facts of these appeals are gathered from the judgment of the learned trial judge, the appeal records and the submissions of parties. We respectfully adopt them with some modifications where necessary.

**[9]** Alias bin Mat Noor ("the deceased") was supposed to pick up his son ("SP9") on 8 July 2015 at 5am to go to his durian orchard. However, the deceased did not turn up as promised. SP9 tried calling the deceased and went to look for him for the whole day, but to no avail. After discussing with his family, SP9 decided to lodge a police report.

**[10]** On 10 July 2015 at 8pm, the police ("SP1") received information that there was an unidentified human body floating in the flood retention pond besides the Putrajaya-Cyberjaya highway. The body was retrieved and an investigation was initiated by the police. The case was investigated by DSP Baloo a/l Muniapan ("SP31").

**[11]** On 13 July 2015, which was three days later, the police went to SP9's house and requested for SP9 and his sister ("SP28") to identify the body in Hospital Serdang. They went there the next day and were able to identify the body of the deceased.

**[12]** On 27 July 2015, the second and third appellants, who were officers of the Special Malaysia Disaster Assistance and Rescue Team ("SMART"), were arrested by the police. According to SP20, when his team arrived at the second appellant's house and identified themselves as police officers, it took them 20 minutes before the door was opened during which the second appellant was seen trying to escape. There was a scuffle between the police and the second appellant before he was finally arrested.

**[13]** According to the deceased's second wife ("SP10"), on 7 July 2015 at about 9.40pm, the deceased was resting in her house when he received a phone call from a caller who wanted to buy some durians. She heard the deceased telling the caller to come another day but the caller insisted on coming that night. The deceased left SP10's house at about 10pm and that was the last time she saw the deceased. She tried calling and texting the deceased after she woke up at 2.30am but there was no response.

**[14]** SP31's investigation with the telecommunication companies revealed that on 7 July 2015 at around 9.30pm to 10.30pm, the deceased received ten incoming calls from the second appellant's phone number.

**[15]** According to the deceased's brother who is also a worker at the deceased's durian orchard ("SP14"), the deceased was seen at the orchard with two male strangers between 10pm to 11pm on 7 July 2015. SP14 saw them in a red Pajero. SP14 could only recall the letters 'PDT' on the red Pajero's registration plate but he could not recall the numbers.

**[16]** SP14 saw the deceased who was sitting at the front passenger's seat. One of the strangers was seen driving the red Pajero and the other was seen sitting behind the deceased at the rear passenger's seat. SP14 was able to identify the third appellant as the one who drove the car and the second appellant as the one who was sitting at the rear passenger's seat. According to SP14, he was able to identify them because of the lighting near the cabin, which came from the moonlight, the bonfires and his torchlight, were bright enough for him to do so. He was also in close proximity with them and he was able to see them for almost five minutes.

**[17]** On 7 July 2015 at around 11pm, another worker at the orchard ("SP16") saw the deceased with the second and third appellants at the cabin in the deceased's durian orchard. SP16 was earlier notified by the deceased that he would be coming to the orchard to fetch some durians. When the deceased arrived there with the second and third appellants, the deceased instructed SP16 to cut open some durians for them to eat. According to SP16, they were there for almost 45 minutes. SP16 with one Adnan later loaded some durians into the red Pajero. Upon the deceased's instruction. After they finished loading the durians, the deceased together with the second and third appellants left.

**[18]** SP14 was able to positively identify the second and third appellants from the dock and during the identification parade. SP16 was only able to identify the third appellant during the identification parade and he was able to identify both the second and third appellants from the dock.

**[19]** Issues were raised regarding SP14's and SP16's identification and we shall deal with them in the latter part of the judgment.

**[20]** The third appellant's wife ("SP25") confirmed that on 7 July 2015 after breaking fast, the third appellant went out with his red Pajero and did not return home, at least before she went to sleep at 12am. When she woke up the next day at around 4am, the third appellant was already at home and she saw some durians brought home by the third appellant.

**[21]** On 7 July 2015, the second appellant was supposed to be on guard duty from 8pm to 10pm. However, the second appellant requested to exchange his shift with his colleague ("SP11") to 10pm to 12pm. The second appellant told SP11 that he had some problems to take care of. However, the second appellant did not turn up the whole night and SP11 had to cover the second appellant's shift instead. During his duty, SP11 noticed the third appellant's red Pajero exiting from the front control post. However, he did not know who was inside the car.

**[22]** SP13 was the second appellant's supervising officer in 2015. SP13 was acquainted with the first appellant. SP13 worked part-time with the first appellant at the first appellant's fishpond. Since June 2015, the first appellant was seen to be very close with the third appellant, and all of SP13's work with the first appellant had been taken over by the third appellant.

**[23]** SP13 received a WhatsApp message from the first appellant containing the deceased's identification card and a message "kasi settle". SP12, an acquaintance of SP13 also received the same message from the first appellant. The next day, SP13 received a call from the first appellant inquiring whether SP13 had received his message. SP13 said that he did. The first appellant was then heard laughing and saying "kasi settle dan kasi bungkus, kasi hilang".

**[24]** SP13 was the second appellant's supervising officer at the material time. According to SP13, the second appellant was supposed to be on duty on 7 July 2015 from 10pm to 12am but he did not turn up. When SP13 called the second appellant to enquire on his whereabouts, SP13 was informed that the second appellant was with the third appellant at a durian orchard. He heard the third appellant sounded a little angry.

**[25]** On 13 July 2015, the third appellant sent his car, the red Pajero with the registration number of PDT 6974 to Safety Automotive Services, Subang Jaya for a paint job. The third appellant met with the shop's supervisor ("SP15") and requested for the red Pajero to be repainted to grey. The third appellant himself paid RM2,000 in cash as deposit and part-payment for the paint job and a receipt was consequently issued. Few days later, the third appellant returned and requested for the whole carpet in the said car to be replaced. Before the paint job was completed, the car was confiscated by the police. SP15 recognised the third appellant.

**[26]** The deceased's daughter ("SP28") confirmed that the deceased prior to his death had five fishponds of which four of them were leased to the first appellant. The first appellant's company, JNJ Fishing, was interested in buying all of the deceased's fish ponds but the deceased and his family were strongly against it.

**[27]** The last time SP28 saw the deceased was on 7 July 2015 at around 4pm in her mother's house. On the next day, SP10 informed SP28 that the deceased went out with people wanting to buy some durians and had not come back since. After some discussion, they agreed to lodge a police report. SP28 did call the first appellant to inquire into the deceased's whereabouts and the first appellant responded, "ayah kamu mungkin pergi ke Thailand, nanti saya panggil orang cari dia".

**[28]** A post-mortem examination of the deceased's body was conducted by Dr. Mohamad Azaini bin Ibrahim, a Forensic Pathologist Expert ("SP18") on 13 July 2015 at around 9.45am. Upon examination of the deceased's body, SP18 found:

(i) linear abrasion 5x0.5cm on the front of the left ankle. Bruise and abrasion 6x2cm on the back of the left upper calf muscle;

(ii) abrasion 1.3x1cm below the jawline, on the left. Incised wound 7x0.5cm on the right side of the forehead;

(iii) few incised wounds on the right ear, suggestive of scavenger artefacts;

(iv) there was a black nylon rope encircling the neck twice with one end of this rope tied to one end of a length of wire; the other end of the wire was in turn tied to a large rock. A length of wire was also seen around the neck. No obvious skin bruising or abrasion was seen immediately adjacent to the neck ligature;

A (v) the hands were tied together at the back with a black nylon rope; this rope is then tied to the left ankle. Two loops of nylon were seen around the right wrist while the left wrist had one loop with multiple knots. There was also a wire tied to the left ankle of which one end is tied to another large rock;

B (vi) two loops of wire were seen around the abdominal area and this wire was attached to the deceased's shorts and to another large rock placed on the deceased's groin area. Two indentation marks were seen on the skin of the abdomen made by these two loops of wire; and

C (vii) no fracture of the hyoid bone. The left superior horn of the thyroid cartilage was fractured.

**[29]** SP18's opinion on the deceased's cause of death was 'probable compression to the neck'. The time since death was estimated to be five days or less prior to the discovery of the body.

D **[30]** While the second appellant was in police custody, he gave information to the police which led to the discovery of a brown sling bag containing the deceased's handphone and personal belongings, the deceased's machete, and a few cards in the name of the deceased, all of which were able to be identified by SP9 and SP28. The police also discovered a pair of scissors and E black nylon ropes based on the information given by the second appellant. The ropes found attached to the body of the deceased and the ropes discovered based on the information given by the second appellant were sent to the Chemist Department for comparison. According to Mr. Sivabalan a/l Nagayah, a Government Science Officer ("SP7"), the ropes were similar F in terms of the colour, size and composition. He opined that the ropes probably originated from the same source.

**[31]** The second appellant took this issue on appeal and we shall deal with them in a latter part of the judgment.

G **Findings Of The High Court At The Close Of Prosecution's Case**

**[32]** At the close of prosecution's case, after conducting a maximum evaluation of the evidence for the prosecution, the learned trial judge found that:

(i) the prosecution had proven that the deceased, Alias bin Mat Noor, had H died through the identification of the deceased's dead body by his next-of-kins, SP9 and SP28;

(ii) the deceased had died as a result of the bodily injury that he had suffered which was sufficient in the ordinary course of nature to cause death, namely, a compression to the neck; and

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(iii) based on the overall facts and circumstances of the case above, which we believe require no repetition, the learned trial judge was satisfied that the second and third appellants were the ones who had inflicted the said bodily injury to the deceased, in furtherance of their common intention.

**[33]** The learned trial judge found that the prosecution had successfully proven a *prima facie* case against the second and third appellants and they were called upon to enter their defence.

**The Second Appellants' Defence**

**[34]** The second appellant's gave evidence on oath. He was not married and was initially enlisted in the army. He was later transferred to SMART Headquarters in Pulau Meranti, Puchong, Selangor in December 2014. The second appellant claimed to have not known the first appellant.

**[35]** On 7 July 2015, the second appellant was supposed to be on duty from 8pm to 10pm. At around 9pm, the second appellant received a call from the third appellant asking him to accompany the third appellant to buy some durians. The second appellant told the third appellant that he was on duty and the third appellant asked him to request some time off from his supervisor, SP13. SP13 initially refused but after the third appellant spoke to him on the phone, SP13 allowed the second appellant to accompany the third appellant. The second appellant left with the third appellant on the third appellant's red Pajero at around 9.30pm.

**[36]** They went to the deceased's house in Taman Haneco, Semenyih to pick him up. They arrived at the deceased's house at around 10.20pm, picked up the deceased and went straight to the durian orchard. They arrived around 11pm and were at the orchard for almost half an hour. After having some durians to eat, they then left the orchard. The second appellant confirmed that the deceased was sitting at the front passenger's seat and he was sitting behind the deceased.

**[37]** Initially, the second appellant denied having called the deceased while he was on his way to the deceased's house but he later changed his version and gave evidence that he did call the deceased on the third appellant's instruction.

**[38]** On the way to the deceased's house, they were stopped at a police roadblock, but they were allowed to pass. They reached the deceased's house around 11.40pm to 11.45pm and dropped him there. They immediately went back to the headquarters and reached there around 12.30am.

**[39]** On 26 July 2015, the second appellant returned to the headquarters to report for duty after finishing his Hari Raya Aidilfitri holiday. At around 2.15am, SP20 with his team of police officers went to his quarters and arrested him. The second appellant denied that he tried to escape and claimed that he was assaulted by the police. After being arrested, he was taken to the Salak Tinggi Police Station.

**[40]** After being interrogated, the second appellant was taken to an open space behind the headquarters where he was ordered to go to a particular place to pick up a bag and point at the machete. He was then brought to the parking lot and ordered to pick up the nylon rope. Later, he was brought to the roadside and ordered to pick up the deceased's cards. The second appellant denied having given any information which led to the discovery of all the things confiscated and denied having dumped all of those things there.

**The Third Appellant's Defence**

**[41]** The third appellant gave evidence on oath. In the year 2015, he was the Chief of Operations, Section 6, SMART Headquarters, Pulau Meranti, Puchong, Selangor. On 7 July 2015 at around 9pm, he left the headquarters with the second appellant to go to the deceased's durian orchard to buy some durians. The third appellant claimed to have only known the deceased coincidentally one week prior to that day.

**[42]** After getting SP13's approval regarding the second appellant's temporary relief of duty, the third appellant left with the second appellant in his red Pajero at around 9.30pm. They went to pick up the deceased at his house in Taman Haneco and later went to the deceased's durian orchard. The third appellant confirmed that he was the one driving the red Pajero, the deceased was sitting next to him at the front passenger's seat and the second appellant was sitting behind the deceased.

**[43]** After they arrived at the orchard, they had some durians to eat and later went to drop off the deceased back at his house around 11.30pm. On the way to the deceased's house, they were stopped at a police roadblock, yet they were allowed to pass. The third appellant reached his house around 1am and he left some durians outside of the house.

**[44]** The third appellant was arrested on 7 July 2015 around 3am at his house. He was only informed by the police that the deceased had died. The police asked about his car and he told the police that his car was sent to a workshop in Subang Jaya. He wanted to repaint the car and replace the carpet for Hari Raya celebration. The third appellant did not know the first appellant.

**Findings Of The High Court At The Conclusion Of The Trial**

**[45]** The learned trial judge found that the appellants' defence was a bare denial and did not cast any reasonable doubt on the prosecution's case. Therefore, the second and third appellants were found guilty as charged, convicted and sentenced to death.

**Duty Of The Appellate Court In Criminal Appeals**

**[46]** It is trite that in criminal appeals against conviction, the duty of the appellate court is to consider whether the conviction is safe. This court in *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389; [2005] 5 MLJ 409 (CA) through the judgment of Gopal Sri Ram JCA held:

> 12. *Unlike civil appeals,* where the appellant carries the burden of showing that the judge at first instance went wrong, *in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe.* See *Mohammad Husain v. Emperor* AIR 1945 Nag 441; *Zahari bin Yeop Baai v. Public Prosecutor* [1980] 1 MLJ 160. That question, on the present facts, must receive a negative response. (emphasis added)

**[47]** See also *Mohamad Deraman v. PP* [2011] 3 CLJ 601; [2011] 3 MLJ 289 (CA).

**[48]** It is also trite that an appellate court should be reluctant to interfere with the trial judge's finding of facts unless the trial judge had clearly and wrongly evaluated the facts. We are guided by the principles enunciated by the Federal Court in *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 (FC) where Zaki Tun Azmi CJ (as he then was) in delivering the judgment of the court held as follows:

> It is an established principle of law that when dealing with finding of facts, the trial judge is more often than not, in a better position to decide. *The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had clearly and wrongly evaluated the facts.* (emphasis added)

**[49]** See also *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359 (FC); *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489 (FC); *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC); and *Lim San Muk v. PP* [2019] 1 LNS 1762 (CA).

**[50]** It is also pertinent to note that as an appellate court, this court has the power to review and re-evaluate all available evidence even though the grounds of decision of the trial judge is found lacking in specific findings or with no reasons for the findings. We are guided by what has been decided by the Federal Court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613 (FC) in the following words:

> Power Of Appellate Court To Review Or To Re-evaluate All Available Evidence
>
> [20] As regards the first main ground of appeal raised by the appellant, *I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and*

*with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct* (see *Mohamed Mokhtar v. Public Prosecutor* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue. (emphasis added)

**[51]** See also *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617 (FC) and *Rasoul Bagherbejandi Ahmad v. PP & Another Case* [2015] 1 LNS 772; [2016] 1 MLJ 272 (CA).

**[52]** Bearing in mind all of the trite principles of law as above, we now turn to consider the issues raised by the parties in the present case.

**Grounds Of Appeal**

**[53]** In short, the second appellant submitted that:

(i) the learned trial judge erred in his finding that SP14 had positively identified the second appellant at the identification parade even though the identification parade was tainted;

(ii) the learned trial judge erred in his finding that the discovery of certain items belonging to the deceased was a discovery under s. 27 of the Evidence Act 1950 as against the second appellant;

(iii) the learned trial judge erred in his finding that the second appellant made ten phone calls to the deceased on the night in question when there was no proof that phone number 014-5017232 belonged to the second appellant; and

(iv) the learned trial judge erred in concluding that the second appellant's defence was a bare denial.

**[54]** On the other hand, the third appellant submitted that:

(i) the learned trial judge erred in his finding that the third appellant had taken his red Pajero to SP15 to hide his crimes;

(ii) the learned trial judge erred by not considering the doubt in the deceased's time of death;

(iii) the learned trial judge erred by not considering the absence of motive on the part of the third appellant;

(iv) the learned trial judge erred by not considering that there was no pre-arranged meeting of the mind and therefore no common intention; and

(v) the learned trial judge erred by failing to invoke adverse inference against the prosecution for their failure to call the security guard at the deceased house to give evidence as witness.

## Our Findings

*Prosecution's Case Is Based On Circumstantial Evidence*

**[55]** At the outset, we find it pertinent to note that the prosecution's case against the second and third appellants is purely based on circumstantial evidence.

**[56]** We refer to the case of *Low Kian Boon* (*supra*) where the Federal Court had quoted with approval the judgment of Visu Sinnadurai J in the case of *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609; [1998] 1 MLJ 184 (HC) as follows:

> [16] The subject of circumstantial evidence has been given detailed attention in *Public Prosecutor v. Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184. in the judgment of Visu Sinnadurai J (as he then was), I find the following relevant:
>
> Law on circumstantial evidence
>
> Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. *Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.*
>
> The law on circumstantial evidence is stated by the learned editors of *Blackstone's Criminal Practice 1991* at pp 1674-1675 as follows:
>
> > Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue, in the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. *Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred, it does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence.* For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

A The learned editors point out further:

> *Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities'* (*Director of Public Prosecutions v. Kilbourne* [1973] AC 729 per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:
>
> B
> > *One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.*
>
> Thus, it may be in circumstantial evidence that *there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may* C *create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of* (*Exall* (1866) 4 F & F 922 at p 929).
>
> However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that: D
>
> > *It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference* (*Teper v. The Queen* [1952] AC 480 per Lord Normand at p 489). E
>
> Nonetheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that *the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion* (*McGreevy v. Director of Public Prosecutions* [1973] F 1 WLR 276).
>
> Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:
>
> G
> > ... to remember only that the prosecution need to prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, ... *in a case depending on* H *circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt* (per Suffian LP in *Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306 at p 310). I
>
> ...

Similarly Mohd Azmi SCJ (as he then was) in *Ng Thian Soong v. Public Prosecutor* [1990] 2 MLJ 148 observed (at p 151):

> It must be noted at this point since *Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306, the then Federal Court had applied *McGreevy v. Director of Public Prosecution* [1973] 1 WLR 276, by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt. *Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt.*

His Lordship then added at p 151:

> But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inference that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.

...

Inferences from circumstantial evidence

In determining the proper inference to be drawn from circumstantial evidence, the Supreme Court in *Ng Thian Soong v. Public Prosecutor* ...:

> ... *Where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence.* He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. *It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at as to the guilt of the accused.*

His Lordship then concluded (at p 150):

> Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

A

> His Lordship pointed out that it was the duty of the trial judge to make a balanced consideration of other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they were equally favourable to the accused.
>
> Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which maybe lacking in truth or accuracy. In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment.
>
> *It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations.* They must give rise to strong inferences so as to become the best evidence.
>
> (emphasis added)

**[57]** More recently, our learned brothers Nantha Balan JCA in *That Wei v. PP* [2021] 1 LNS 1358; [2021] 6 MLJ 167 (CA) made the following observation:

> [3] It is necessary to state at the outset, that the prosecution's case was based on circumstantial evidence. There was no direct evidence to implicate the appellant with the murder of the deceased who was 31 years old when she died. There were no eyewitnesses who saw the deceased committing the offence. But there was direct eyewitness evidence which placed the appellant at the scene of the crime at about the time when the deceased's body was discovered. All the other evidence which was relied upon by the prosecution were strands which constituted circumstantial evidence.
>
> [4] The law does not insist that there must be direct evidence such as the evidence of an eyewitness. *Thus, the absence of an eyewitness is not of itself indicative of whether the accused was complicit in the crime for which he had been charged. In the absence of direct evidence, the prosecution has to rely on circumstantial evidence, in some situations, circumstantial evidence is the only available evidence. However, the circumstantial evidence must be of such a nature and quality that it is compelling and convincing to amount to proof of beyond reasonable doubt, in that sense, circumstantial evidence may be as good as direct evidence.* In this regard, it is appropriate to refer to the words of Lord Hewart CJ in the case of *R v. Taylor, Weaver and Donovan* (1928) 21 CrApp R 20, CCA at p 21 where he said:
>
> It has been said that the evidence against applicant is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that it is circumstantial.

B C D E F G H I

[5] *The challenge for the prosecution in mounting a case which is predicated on circumstantial evidence is that they bear a heavy burden in their endeavour to secure a conviction.* In *Lim Hean Cheong v. Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046; [2011] 1 LNS 1078; [2012] 1 AMR 160 (CA) the Court of Appeal described the prosecution's burden in the following words:

> [53] In this case the prosecution relied purely on circumstantial evidence to prove its case against the appellant. *The onus on the prosecution, where the evidence relied on is circumstantial, is a very heavy one and that the evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient* (*Chang Kim Siong v. Public Prosecutor* [1968] 1 MLJ 36).
>
> *Where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?* (*Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307).
>
> [54] In *Chandmal & Anor v. State of Rajasthan* AIR 1970 SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:
>
> > It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. *Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.* That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (emphasis added)

**[58]** As highlighted by the learned Deputy, the prosecution relied on the following circumstantial evidence against the second and third appellants, namely:

(i) the second appellant being the owner of phone number 014-5017232, was the one who called the deceased that night in question and insisted on going to the deceased's durian orchard;

(ii) the second and third appellants were the last people to be seen with the deceased before he went missing and was later found dead (the "last seen together" theory);

(iii) the conduct of the second appellant who tried to escape and had resisted arrest when the police went to his house to arrest him;

(iv) the discovery of some personal items belonging to the deceased based on the information given by the second appellant while he was in police custody;

(v) the discovery of the black nylon ropes based on the information given by the second appellant while he was in police custody, which according to the Science Officer SP7, were similar in terms of colour, size and composition and probably originated from the same source with the ropes found tied on the body of the deceased; and

(vi) the conduct of the third appellant in sending his red Pajero to be repainted and to replace the whole carpet after the deceased's body was found.

**[59]** According to the learned Deputy, all these pieces of circumstantial evidence when taken cumulatively would point irresistibly to the second and third appellants' guilt.

**[60]** Below are the issues raised by the second and third appellants in the present case.

*First Issue: Whether Phone Number 014-5017232 Belonged To The Second Appellant*

**[61]** Learned counsel for the second appellant submitted that the learned trial judge erred when he found that the second appellant made ten calls to the deceased on the night in question. According to learned counsel for the second appellant, there was no evidence to prove that phone number 014-5017232 belonged to the second appellant.

**[62]** We have gone through the appeal records and we disagree with learned counsel for the second appellant for the following reasons.

**[63]** Firstly, the prosecution called SP29, a senior officer from the Authority Request, Security Department, DiGi Communications to give evidence. According to SP29, there were six phone numbers registered under the deceased's name at the material time and the two relevant numbers were 014-6331477 and 014-6375123. The records showed that there were ten incoming calls from the number 014-5017232 on 7 July 2015 between 9.31pm to 10.22pm. Only two of them were successful.

**[64]** Secondly, the prosecution also called SP30, an executive officer from Celcom to give evidence. According to SP30, the phone number 014-5017232 was registered in the name of the second appellant at the material time. SP30 also stated that based on the records, there was a mistake in the identification card ("IC") number. The learned Deputy contended that the difference in the IC number is only in the last digit, which was stated as "4" when it should have been "3". Evidence has also shown that Celcom had sent a message to the second appellant to rectify his IC number yet he did not do so.

**[65]** When asked about his phone number during cross-examination, the second appellant replied that he didn't remember. However, the most crucial evidence against the second appellant was that he finally admitted to have called the deceased that night on the instruction of the third appellant. He also admitted to have stored the deceased's phone number in his handphone.

**[66]** Therefore, we find this issue to be without any merits and we see no reason to disturb the finding of the learned trial judge, thereof.

*Second Issue: The "Last Seen Together" Theory*

**[67]** First and foremost, it is trite that the "last seen together" theory ie, the fact that the accused and the deceased were last seen together is an incriminating fact against the accused. However, the mere fact that the accused was last seen together with the deceased does not necessarily lead to the irresistible conclusion that the accused had committed the crime (see *Ratanlal & Dhirajlal's Law of Crimes* cited with approval by this court in *Ho Sek Kong v. PP* [2011] 6 CLJ 522).

**[68]** In order to successfully attract the application of this theory, the prosecution must be able to lead evidence to show that shortly before the commission of crime, the accused and the deceased were seen together. The time gap must be very small that there may not be any possibility that any person other than the accused could have committed the crime.

**[69]** On this point, we found the decision by the Supreme Court of India in *Mahavir Singh v. State Of Haryana* [2015] 3 CLJ 1009 to be highly persuasive as can be seen below:

> [12] Undoubtedly; it is a settled legal proposition that the last seen theory comes into play only in a case *where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (sic is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime.* In the instant case, if we examine the medical report minutely, it becomes evident that the deceased Suraj Mal had been murdered one week prior to the post-mortem. Thus, it becomes evident that he had been killed in a very proximity of time when the deceased was seen alive with the appellant and Jagbir Singh, co-accused. (emphasis added)

**[70]** The "last seen together" theory was also applied locally as can be seen from a series of authorities. One of them is *Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain* [2017] 1 LNS 502 (CA) where this court held as follows:

> [23] Kami juga bersetuju dengan penghujahan Timbalan Pendakwa Raya berkenaan dengan pemakaian konsep "last seen together" seperti mana diputuskan dalam kes *Ashok v. State of Maharashtra* [2015] 4 Supreme Court 393. Dalam kes ini, Mahkamah Agung di India telah memutuskan seperti yang berikut:

A The "last seen together" theory has been elucidated by this Court in *Trimukh Marotiu Kirkan v. State of Maharashtra* [2006] 10 SCC 106, in the following words:

> Where an accused is alleged to have committed the murder of his wife and *the prosecution succeeds in leading evidence to show*
B *that shortly before the commission of crime they were seen together* or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates
C that he is responsible for commission of the crime. *Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.*
>
> In *Ram Gulab Chaudhary v. State of Bihar* [2001] 8 SCC 311,
D the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused
E about the boy, there was every justification for drawing an inference that they had murdered the boy.

In *Nika Ram v. State of H.P.* [1972] 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the
F relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

The latest judgment on the point is *Kanhaiya Lai v. State of Rajasthan* [2014] 4 SCC 715. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who
G committed the crime. *There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.*

From the study of above stated judgments and many others
H delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and
I thus, would have burden of proof as per Section 106 of Indian Evidence Act. *Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations*

*between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.*

(emphasis added)

**[71]** On this issue, learned counsel for the second appellant submitted that the learned trial judge erred in his finding that SP14 had positively identified the second appellant at the identification parade.

**[72]** According to the second appellant, the identification parade was tainted since SP14 had already seen the second appellant at the durian orchard for the second time when the police had taken the second appellant there before the identification parade was conducted. This fact was admitted by SP14 when he gave evidence in court.

**[73]** The Federal Court in the case of *Chang Kim Siong v. PP* [1967] 1 LNS 18; [1968] 1 MLJ 36 made it clear that in circumstances when the witness had the opportunity to see the accused before the identification parade was conducted, the evidence of subsequent identification at the parade by him was supposedly vitiated.

**[74]** However, it is also important to note that SP14 was able to identify the second appellant from the dock.

**[75]** The underlying jurisprudence pertaining to identification evidence has been explained in detail in *Dorai Pandian Munian & Anor v. PP* [2012] 10 CLJ 22; [2009] 4 MLJ 525 (CA) which we believe requires no repetition.

**[76]** Suffice to say that we agree with Ahmad Maarop JCA in *Dorai Pandian Munian* (*supra*) that the substantive evidence of identification is the evidence of identification in court. It is not in all cases that the defects relating to the identification parade justify the rejection of the identification evidence given by witnesses in court. The following is observed:

> Generally speaking, however, a dock identification in the sense as described above ie *identification of an accused for the first time in court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent.* There may well be situations where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.
>
> Briefly, therefore, the answer to question one (1) is: it depends on the particular facts and circumstances of each case. (emphasis added)

**[77]** In *Ong Poh Cheng v. PP* [1998] 4 CLJ 1; [1998] 4 MLJ 8 (CA), Shaik Daud Ismail JCA in delivering the judgment of this court said:

A *It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant.* He rejected it not because there was no identification of the appellant as the robber, but because there were defects in the conduct of the parade (the appellant was in fact identified). *In the light of this we find that his rejection of the evidence of the identification at*
B *the identification parade was in no way fatal to the dock identification of the appellant as the robber.* (emphasis added)

**[78]** In delivering the judgment of the Federal Court, Chong Siew Fai CJ (Sabah & Sarawak) in *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 held:

C By the term 'dock identification' we take it to mean identification of an accused for the first time in court at trial. And we shall attempt to answer the question posed with that meaning of the term in mind.

The question, as framed, is in general terms and lacks precise or essential facts necessary for a definite answer of 'Yes' or 'No'. *Much depends on the*
D *precise circumstances and the stance of the defence. How long is the 'long lapse'? What are the circumstances in which a witness has seen the accused eg the distance between him and the accused, the weather condition, any lighting particularly if at night, and, if so, quality of the lighting, the length of time the witness sees or observes the accused, any conversation carried on between them, whether the witness has known or seen the accused prior to the incident, and so forth.* Facts such as those
E mentioned above are lacking, but they are essential for the purpose of arriving at a more definite answer to the above question referred. (emphasis added)

**[79]** The learned trial judge made the following findings with regard to the quality of SP14's identification:

F Di dusun durian pula, SP14 yang bekerja di situ mengatakan lebih kurang jam 10.00 malam, si mati telah datang ke dusun itu dengan 2 orang yang tidak dikenalinya menaiki kereta jenis Pajero merah, nombor pendaftaran PDT. Menurut SP14, beliau boleh mengecamkan kedua-dua lelaki itu ialah OKT 3 sebagai pemandu kereta dan OKT 2 duduk di belakang kereta pada malam itu ... Penjelasan oleh SP14 itu ialah pada malam itu
G cahaya cukup terang di pondok durian dan dia memegang lampu suluh dan ada menyuluh muka OKT 3 dan OKT 2. SP14 juga berkata beliau ada melihat muka mereka di pondok durian selama 5 minit.

**[80]** We have gone through the appeal records and we agree with the finding of the learned trial judge. Hence, we are satisfied that SP14's dock
H identification was satisfactory.

**[81]** In addition to the above, it is also pertinent to note that the second and third appellants themselves in their defence confirmed that they did go with the deceased to the durian orchard that night in question. They also confirmed the position that they were inside the third appellant's car, as per
I the prosecution's version.

**[82]** Therefore, we are of the view that the non-compliance by learned trial judge to exercise caution as outlined in the *Turnbull* guideline is not fatal, taking into account all evidence adduced in the present case.

**[83]** On this issue, we refer to the Federal Court case of *Arumugam Muthusamy* (*supra*) where Chong Siew Fai CJ (Sabah & Sarawak) in delivering the judgment of the court held:

> *As regards the guidelines in R v. Turnbull, it would not be right to say that the trial magistrate had totally failed to comply with them.* Indeed, in fairness to Mr Karpal Singh acting for the applicant, this was not his contention. As a matter of fact, the trial magistrate did examine the circumstances in which PW1 and PW2 identified the applicant on 1 or 2 April 1986, eg the area in that night was bright, that the meeting with the applicant was for some 15 minutes, etc.
>
> *The only failure by the trial magistrate, contended for the applicant, was the administration of caution to herself.* In this regard, the guidelines in *R v. Turnbull* stated (at p 554C):
>
> > A failure to follow these guidelines is likely to result in a conviction being quashed and *will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.*
>
> In the instant case before us, it would have been prudent to hold an identification parade. *However, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole,* more particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting, *inter alia*, the recovery of the car keys from the applicant, the use of the car by the applicant, the removal of the car from the front of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, we see no failure of justice having occasioned nor do we see any ground for contending that the conviction is unsatisfactory or unsafe. *This is not a case in which the witness's ability to make identification is in doubt.* We see no reason to interfere with the trial magistrate's finding which was affirmed by the High Court. We are of the unanimous view that on the particular facts and circumstances of this case, there had been no miscarriage of justice and that the concurrent findings of the trial magistrate and the High Court ought not to be disturbed. We accordingly order the conviction and the 14 months imprisonment sentence do stand.
>
> As the applicant is on bail, the bail is hereby revoked. Security deposit for the bail, if given, to be returned. The applicant do forthwith serve the sentence as imposed, regard, however, to be had to the time of imprisonment that he has already served.
>
> (emphasis added)

**[84]** For reasons enumerated above, we find that there is no merit in this issue.

**[85]** Learned counsel for the third appellant, on the other hand, submitted that on the night in question, they had already sent the deceased back to his house around 11.30pm. He further submitted that there was a guardhouse below the deceased's house but the prosecution failed to call any of the guards standing by that night to give evidence. This, according to learned counsel for the third appellant, should raise an adverse inference against the prosecution.

**[86]** However, we agree with the learned Deputy that this issue was not put forward during the prosecution's case and was only raised during the defence. We would therefore dismiss it as a mere afterthought.

**[87]** Another issue raised by learned counsel for the third appellant was that the deceased could have died on any day, from 5 July 2015 to 10 July 2015 since the Forensic Pathologist Expert, SP18, estimated that the time of death was five days or less prior to the discovery of the body.

**[88]** We found no merit in this submission. Prosecution witnesses had testified that they saw the deceased well and alive up until 11pm to 11.45pm on 7 July 2015 when the deceased was last seen leaving the durian orchard with the second and third appellants in the red Pajero.

**[89]** The deceased's second wife, SP10, gave evidence that the deceased left SP10's house at about 10pm and never came back. There was already no response when she tried calling and texting the deceased after she woke up at 2.30am the next day. These facts were never challenged by the appellants since SP10 was never cross-examined.

**[90]** Therefore, we are also of the considered view that there is no merit in this issue.

*Second Issue: Information Leading To Discovery*

**[91]** Learned counsel for the second appellant submitted that the learned trial judge erred when he found that some personal items belonging to the deceased were discovered pursuant to an information given by the second appellant under s. 27 of the Evidence Act 1950.

**[92]** It was the prosecution's case that the second appellant had given information to SP20 which led to the discovery of the deceased's personal belongings, namely a brown sling bag containing the deceased's Malaysian passport, receipt by Persatuan Syarikat-Syarikat Sewa Beli Malaysia, mixed Malaysian Ringgit of RM233, two handphones and a machete.

**[93]** On this issue, the learned trial judge in his grounds of judgment found that:

> 16. Pihak pendakwaan juga telah membuktikan pemakaian s. 27 Akta Keterangan 1950 dengan baik dan saya menerima keterangan-keterangan tersebut untuk diguna pakai di dalam kes ini terhadap OKT2 ...

**[94]** Learned counsel for the second appellant submitted that the police had prior knowledge of the whereabouts of all the recovered articles, thus s. 27 of the Evidence Act 1950 was not applicable. Reference was made to the case of *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350; *PP v. Liew Sam Seong* [1981] 1 LNS 159; [1982] 1 MLJ 223; and *PP v. Hashim Hanafi* [2003] 8 CLJ 555; [2002] 4 MLJ 176.

**[95]** Learned counsel for the second appellant based his argument on the evidence of SP9. According to learned counsel for the second appellant, SP9 gave evidence that he was asked by the police to identify the deceased's personal items in IPD Sepang the same day. SP9 and SP28 were asked to identify the body of the deceased in Hospital Serdang.

**[96]** The relevant part of SP9's evidence during examination-in-chief as pointed out by learned counsel for the second appellant, which was not challenged during cross-examination, is as follows:

S: Setelah cam mayat ini ada apa-apa lagi yang polis suruh kamu buat?

J: Dia ada suruh cam barang.

S: Bila?

J: Pada hari yang sama.

S: Kamu kata cam barang di mana?

J: Cam baju, seluar di Hospital Serdang ada cam barang juga di IPD Sepang.

S: Di IPD Sepang kamu cam barang apa?

J: Cincin.

S: Cincin siapa?

J: Ayah saya.

S: Cincin sahaja?

J: Dengan jam.

...

S: Kamu ingat lagi barang-barang kes yang kamu cam di IPD Sepang?

J: Ingat.

...

S: Kamu kata kamu diarahkan ke IPD Sepang untuk camkan barang-barang kes oleh ASP Baloo. Kalau saya tunjukkan kamu masih boleh camkan?

J: Boleh. Beg, parang dan sarung, kotak rokok dan ketip kuku, yang lain saya tak ingat.

**[97]** According to learned counsel for the second appellant, this in turn would support the second appellant's evidence that he was merely ordered to point at and pick up the said items.

**[98]** However, SP28 was called to give evidence and her evidence on the same issue was as follows:

S: Pengecaman mayat Asywat yang buat?

J: Saya dan Asywat yang buat.

M: Dikecualikan.

S: Pada hari tersebut selain buat pengecaman mayat ada benda lain berlaku atau kamu terus balik rumah?

J: Terus balik rumah.

S: Jadi first time pergi ke IPD Sepang untuk beri statement, selepas itu terus pergi hospital untuk pengecaman mayat dan terus balik rumah?

J: Betul.

S: Selepas itu ada pada bila-bila masa ada terima apa-apa arahan daripada polis?

J: Lama juga selepas itu untuk buat pengecaman barang.

S: Jadi semasa pengecaman mayat dibuat pengecaman barang ada dibuat ke tidak?

J: Semasa pengecaman mayat dibuat, saya ada minta doktor yang buat Forensik keluarkan barang-barang ayah.

S: Barang-barang itu apa?

J: Baju, seluar, cincin, jam tangan, barang-barang yang lekat di badannya.

S: Dan kali kedua kamu pergi untuk pengecaman barang atas arahan siapa?

J: Tuan Baloo.

S: Yang buat pengecaman itu siapa?

J: Saya dan Asywat (SP9).

S: Barang yang kamu itu apa?

J: Parang dan sarung, beg galas Polo ayah, dalam beg itu ada handphone, kad yang telah dipotong, duit.

S: Dokumen peribadi ada?

J: Ada, ada passport.

S: Lepas buat pengecaman mayat, pengebumian ayah kamu?

J: Betul.

S: Kamu ingat sebelum pengecaman di Mahkamah ini kamu ada dipanggil pada bila-bila masa oleh DSP Baloo untuk membuat pengecaman di balai polis?

J: Ada.

S: Bila?

J: 29.7.2015.

S: Dan kamu pergi ke mana?

J: IPD Sepang.

S: Kamu pergi bersama siapa?

J: Asywat (SP9).

**[99]** SP28's evidence above was not challenged during cross-examination. We also found that SP31 gave similar evidence, which was also not challenged during cross-examination, as can be seen in his witness statement that:

> Pada 29.07.2015, saya telah memanggil semula anak mangsa bernama Asywat bin Alias dan Asyura binti Alias untuk cam barang kes yang dirampas melalui Syazwan Saad. Kedua-dua saksi berjaya cam barang-barang tersebut milik ayahnya dan saya turut merakam sambungan keterangan saksi tersebut.

**[100]** Learned counsel for the second appellant attempted to highlight this issue through the cross-examination of SP20. However, SP20 in his evidence was adamant that the police had no prior knowledge regarding the whereabouts of things seized and confirmed that had it not been for the information supplied by the second appellant, the things would not have been discovered. SP20 also gave evidence that he had no reason to fabricate any evidence against the second appellant.

**[101]** Therefore, we are of the view that the discrepancy in SP9's evidence was minor, insignificant and did not affect the totality of the evidence adduced by the prosecution on the said fact.

**[102]** In *Chean Siong Guat v. PP* [1969] 1 LNS 23; [1969] 2 MLJ 63 which was also cited with approval by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737; [2004] 3 MLJ 405, the following was held by Abdul Hamid J:

> At the hearing of this appeal the learned counsel for the appellant raised a number of grounds. *He submitted that the learned magistrate erred in law as well as in fact in holding that the discrepancies in the evidence between PW1 and PW2 were trivial. In dealing with these discrepancies, the learned magistrate said: "To my mind these contradictions were minor differences and they do not affect the*

*case in that the exhibits were found in possession of accused."* He went on to cite a passage from *Sarkar on Evidence*, 10th edition at page 46 under the heading "Discrepancies" which states:

> Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. *But trifling discrepancies should be ignored as they are often a test of truth.*
>
> The magistrate ignored these discrepancies. Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies.
>
> *Absolute truth is I think beyond human perception and conflicting versions of an incident; even by honest and disinterested witnesses, is a common experience.* In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies, if, after considering them. On the other hand, if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth. *In the present case, what the learned magistrate in fact found was that the discrepancies were minor and he quite properly ignored them.*
>
> (emphasis added)

**[103]** In our view, the discovery of the deceased's personal items based on the information supplied by the second appellant shows that he knew of the various locations that the items had been disposed of, and this would raise a strong presumption in support of the prosecution's case that he was involved in the murder of the deceased.

**[104]** We are guided by the same approach taken by the Federal Court in *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137; [2017] 3 MLJ 141 (FC) where it was held that:

> [104] In a nutshell, SP32 testified that the second and fourth accused persons at the abovementioned times and dates had given information leading to the discovery of the items.
>
> [105] If the above evidence of discovery were accepted, *they would support the prosecution case of the involvement of the second and fourth accused persons in the murder of Sosilawati and the three others.* As will be discussed later, these items discovered fall under 'circumstantial evidence' ...

... [246] *The acts of the second and fourth accused persons leading SP32 to the location where the Seiko watch, the logs and the zinc sheets were found, and pointing to the location, are admissible as conduct under ss. 8 and 27 of the EA. The conduct and information leading to the discovery show that the second and fourth accused persons knew of the various locations where the items had been disposed of.* They would not have had such knowledge had they not participated in the acts leading to the deaths of Sosilawati and the three others.

(emphasis added)

**[105]** In a nutshell, for reasons enumerated above, we find no merits in this issue.

*Third Issue: The Second And Third Appellants' Conduct*

**[106]** Learned counsel for the third appellant submitted that the learned trial judge erred when he found that the conduct of the third appellant in sending his car the red Pajero to be repainted raises the presumption that he was trying to hide their crime of murdering the deceased.

**[107]** On this issue, the learned trial judge made the following findings:

(f) Keterangan menunjukkan selepas kejadian ini OKT3 telah menghantar kereta Pajero beliau ke bengkel SP15 untuk mengecat keretanya, iaitu menukar cat kepada warna "grey". SP15 telah mengecamkan OKT3. Menurut SP15 juga OKT3 telah membayar deposit RM2,000 kepadanya. 2/3 hari kemudian menurut SP15, OKT3 datang balik dan meminta SP15 untuk menukar karpet dalam kereta itu. Keterangan OKT3 adalah dia perlu menukar cat dan karpet kerana ingin menggunakan pada Hari Raya Aidil Fitri.

(g) Keterangan ini menurut TPR adalah bertujuan untuk menghapuskan bukti jenayah mereka. Saya menerima hujah ini kerana ia adalah menjurus kepada satu keadaan di mana OKT2 dan OKT3 cuba melindungi jenayah mereka dan supaya kereta yang digunakan pada malam itu tidak boleh dicamkan oleh saksi-saksi yang berada di dusun simati pada malam itu.

**[108]** In fact, if we may elaborate, the overall circumstances of the case support the learned trial judge's findings. In the present case, the body of the deceased was tied to a rope on one side and tied to a few rocks on the other side. The deceased's body was dumped in the flood retention pond in that state. It is therefore safe to presume that the body was not intended to be found but to be disposed of for good.

**[109]** As fate would have it, the deceased's body was discovered on 10 July 2015, some two to three days after the deceased's disappearance. Investigation was immediately conducted by the police. It was also not a coincidence that the witnesses were able to identify the deceased's car. The colour and the model of the car were peculiar and easily distinguishable.

**[110]** Three days later, on 13 July 2015, the third appellant went to SP15's shop to repaint his whole car to another colour, from red to grey. This is the same day SP9 and SP28 were requested by the police to identify the deceased's body. After a few days, the third appellant returned and requested to replace the car's whole carpet as well.

**[111]** SP15 gave evidence that the third appellant wanted the job to be completed as quickly as possible but did not inform him of the reason why. If it was indeed true that the third appellant requested the car to be repainted for Eid celebration, which was only due few days later, he would have told SP15 about it so that the car would be ready by that time. This negates the third appellant's defence that he sent the car there to be repainted for the purpose of celebrating Eid.

**[112]** We are of the view that the learned trial judge had properly considered all available evidence before reaching that finding. As such, we agree with the findings of the trial judge and we see no reason to disturb the same.

**[113]** As for the second appellant, evidence showed that the second appellant tried to escape and resist arrest when SP20 and his team went to his house. During the defence stage, the second appellant simply denied and claimed to have been assaulted by the police. On the other hand, after careful perusal of the appeal records, we found no reason to suspect the truth of the evidence of SP20 since there is no reason for SP20 to fabricate any evidence against the second appellant.

**[114]** In *Soha Beta v. PP* [2020] 1 LNS 62 (CA), we agree with our learned sister Rhodzariah Bujang JCA that:

> Equally pertinent to the 1st accused is the fact that he had behaved aggressively and tried to escape as mentioned earlier in our judgment. That evidence is relevant under section 8 of the Evidence Act 1950 *which militates against the claim of innocence by the 1st accused.* The principle to be applied on this point of law is explained by the Federal Court in *Parlan Dadeh v. Public Prosecutor* [2009] 1 CLJ 717 at page 746-747 as follows:
>
> > [36] The law relating to evidence of conduct is thus patent, if there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. *Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or*

> *draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance* (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage.
>
> In his statement, the 1st accused merely said he surrendered voluntarily (see page 416, Volume 2 (3) of the Appeal Record) *but we find no reason to find that PW4 had fabricated his evidence against the 1st accused.*
>
> (emphasis added)

**[115]** Therefore, since the second appellant failed to discharge the onus of explaining his conduct as mentioned above, an inference against the claim of innocence of the second appellant may be safely presumed.

**[116]** In short, we also found that there is no merit to this issue.

*Fourth Issue: Motive*

**[117]** Learned counsel for the third appellant submitted that the learned trial judge erred when he failed to consider the absence of motive on the part of the third appellant.

**[118]** Learned counsel for the third appellant submitted that motive is essential in the present case since the prosecution's case is based on circumstantial evidence. Reliance was placed on a passage of Hamid Sultan Abu Backer JCA's judgment in *Aung Thun & Anor v. PP* [2013] 1 LNS 985; [2014] 1 MLJ 784 (CA) as follows:

> [13] In addition we must say the learned counsel's argument that the prosecution ought to have shown motive for the murder has no merits on the facts of the case. **Motive may be essential if it is a case where the prosecution is relying on circumstantial evidence.** Unlike common law offence of murder, the statutory offence of murder or manslaughter based on ss. 299 and 300 of the Penal Code strictly does not require motive as an element to be proved. If at all evidence of motive is introduced by the prosecution where direct evidence is available for homicide then it is only meant to strengthen the probative force of the prosecution case and/or to negate the defence of self defence or provocation, etc at the earliest stage. (emphasis added)

**[119]** We agree with learned counsel for the third appellant. In fact, Mohd Zawawi Salleh JCA in *Rajamorgan Marimuthu v. PP* [2014] 6 CLJ 850 (CA) reiterated that:

A [28] In this instant case, the prosecution failed to establish by positive evidence any motive on the part of the appellant to murder the deceased. *It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstances evidence* (See *Yap Boon Thai v. PP* [2013] 1 LNS 1181; [2013] 6 MLJ 236). *Absence of motive in this case, therefore, is clearly a matter*
B *to be taken into account by the court.* In so far as motive is concerned, SP9's evidence was much in favour of the appellant. She said that the appellant and his wife were very fond of the deceased and had expressed their desire to adopt the deceased. SP9 also stated that there were instances in which the appellant had helped her to send the deceased to seek medical treatment at the local clinic. The fact that he rushed the deceased
C to the clinic would neutralised any suggestion that he personally want the deceased dead. (emphasis added)

**[120]** According to learned counsel for the third appellant, there was no evidence to show that the third appellant had any motive to murder the deceased. We agree with learned counsel for the third appellant that there
D was no evidence to show motive on the part of the third appellant and even the second appellant for that matter. This was also admitted by the learned Deputy during oral submission.

**[121]** However, the learned Deputy contended that they are not relying on
E motive but the "last seen together" theory and other circumstantial evidence to prove their charge against the second and third appellants.

**[122]** We agree with the learned Deputy and are further of the view that the absence of motive even when the prosecution's case relied solely on circumstantial evidence does not in itself exculpate the accused or render the
F conviction to be unsafe.

**[123]** In *Abdul Samid Edward v. PP* [2015] 4 CLJ 149 (CA) which was quoted with approval by the Federal Court in *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137 (FC), this court held as follows:

G [32] *Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him,* notwithstanding all other evidence which points to the accused being guilty of the crime charged. (emphasis added)

H **[124]** The Federal Court in *Pathmanabhan Nalliannen* (*supra*) further held:

[165] We wholly endorse the observations made above in that motive is an important factor but not an ingredient of an offence to be proved in cases which turn on circumstantial evidence as in the present case. That said, it does not mean that where evidence of motive is vague, non-
I existent or not clear, an accused is exculpated provided there is sufficient evidence pointing to his guilt.

[166] **Having considered the matter, we agree with the defence that evidence of motive as adduced by the prosecution is far from being satisfactory.** At one stage, the prosecution contended that the unavailability of sufficient funds in the bank account of the first accused was the motive for the murder of Sosilawati and the three others. Later, the prosecution referred to the Penang land transaction as the motive behind the murder. In the circumstances, we hold that the evidence as regards motive is far too equivocal to be of any value.

[167] **However, as said earlier, motive may be helpful in assisting the court in coming to its decision but the absence of such evidence is not fatal to the prosecution case.** (See: *Bhikari Behera v. State of Orissa* 1995 Cri LJ 2998, 3000 (Ori); and *Rangi Lai v. State of Uttar Pradesh* 1991 Cri. LJ 916, 921 (All)). (emphasis added)

**[125]** Therefore, we conclude by holding that even though the prosecution fell short of proving motive to murder the deceased on the part of the second and third appellants, there was other circumstantial evidence which supports the conviction against them based on the overall circumstances of the case which has been discussed above.

*Fifth Issue: Common Intention*

**[126]** Learned counsel for the third appellant submitted that the learned trial judge erred when he failed to consider there was no evidence of a pre-arranged plan and therefore, no evidence of common intention.

**[127]** On this issue, we are guided by what has been decided by the Federal Court in *Farose Tamure Mohamad Khan v. PP & Other Appeals* [2016] 9 CLJ 769 (FC) where Raus Sharif PCA (as he then was) in delivering the judgment of the court held:

[66] *The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.* Direct evidence as proof is difficult to procure because the common intention is essentially a state of mind. *Invariably inferences have to rely upon arising from such acts or conduct of the accused the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence* for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved. (emphasis added)

**[128]** The learned trial judge found that the prosecution had successfully proven the element of common intention based on the overall facts of the case. The following can be observed:

A

> 25. Mengenai seksyen 34 Kanun Keseksaan, saya berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan isu ini dengan baik. Saya merujuk kembali kepada fakta-fakta kes di atas, khususnya keterangan daripada SP14, SP16, SP11 dan lain-lain saksi jelas menunjukkan kedua-dua OKT ini mempunyai niat bersama, saya merujuk kepada kes-kes berikut *Sabarudin bin Non & Ors v. PP* [2005] 4 MLJ 37, *PP v. Premakumar Balan And Anor* [201] 3 CLJ 73, *Ravindran a/l Ramasamy v. PP* [2013] 4 AMR 502 dan *Ashok Kumar v. State of Punjab* [1977] AIR SC 109.

B

**[129]** We agree with the finding of the learned trial judge and we see no reason to disturb the same.

C *Sixth Issue: Bare Denial*

**[130]** Learned counsel for the second appellant submitted that the learned trial judge erred when he found that the second appellant's defence was akin to a bare denial.

D **[131]** The complaint was directed at a passage of the learned trial judge's decision as can be seen in the grounds of judgment and reproduced below:

> 49. Melalui pemerhatian yang saya buat sepanjang kes pembelaan, saya dapat membuat satu penemuan iaitu pembelaan ketiga-tiga OKT adalah semata-mata penafian kosong tanpa disokong oleh mana-mana keterangan lain sama ada melalui keterangan lisan saksi-saksi mereka ataupun kenyataan beramaran mereka.

E

**[132]** According to learned counsel for the second appellant, the learned trial judge fell into error when he imposed a higher burden on the appellants than what is required under the law. Reference was made to the case of *Wong Chooi v. PP* [1967] 1 LNS 207; [1967] 2 MLJ 180 and *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] 1 MLJ 150.

F

**[133]** We do not agree with learned counsel for the second appellant. It is trite that a bare denial is when the accused did not offer any explanation to the charge and merely denied the evidence of the prosecution. The defence of bare denial is no defence. Hence, it cannot be said that the learned trial judge had imposed a higher burden than what is legally required against the appellants in the present case.

G

**[134]** This court in *Losali v. PP* [2012] 2 CLJ 178; [2011] 4 MLJ 694 (CA) made the following observation:

H

> [54] The learned trial judge rightly held that the defence of the appellant was a bare denial. **It is trite law that the defence of bare denial is no defence.** What this amount to is this. **That the appellant did not offer any explanation to the two charges and merely denied the evidence advanced by the prosecution.** That was indeed a perilous course to undertake.
>
> (emphasis added)

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**[135]** As correctly pointed out by the learned Deputy, the trial judge had analysed the appellants' defence thoroughly before coming to the above conclusion, as can be seen in the subsequent part of the learned trial judge's grounds of judgment.

**[136]** We have gone through the appeal records and we found no reason to disturb the findings of the learned trial judge on this issue.

**Conclusion**

**[137]** In conclusion, after careful perusal of the appeal records and after hearing the submissions of all parties, we have come to a unanimous decision that there was no misdirection committed by the learned trial judge in his decision. We also found that the learned trial judge did not err both in fact and in law in arriving at the said decision and we see no reason to disturb the same. We are also of the view that based on the evidence adduces when taken in totality, the conviction against the second and third appellants is safe. Accordingly, the second and third appellants' appeals are dismissed and the learned trial judge's decision is hereby affirmed.